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DUE PROCESS OF LAW

A. NOTICE AND THE OPPORTUNITY TO BE HEARD

PROBLEM CASE: THE DUE PROCESS GAME

In your second week of law school, you find a letter from the President of the University in your mailbox. On official letterhead, it reads:

You have been accused of a serious Honor Code violation. Please discontinue class attendance immediately and make arrangements to leave campus.

What further information would you want from the University? What procedures would you expect? What kind of hearing would you seek? Would you want someone else to speak for you? What sort of decision maker would you desire? What rights would you assume? Are your assumptions about rights dependent on whether you are innocent or guilty of the violation? On the severity of the penalty?

Most Americans, especially law students, will construct an elaborate model for deciding whether there was an Honor Code violation and what penalty should apply. A sense of the process due, of how facts should be found, and what results should follow is part of both the legal culture and the larger culture of our society.

Due process, both as aspiration and as method, is at the heart of our study of civil procedure. Rules, statutes, and formal and informal decision making must all meet a due process standard. The U.S. Supreme Court has spoken on the Constitution's guarantees in the Fifth and Fourteenth Amendments in many settings. Sometimes, the process due is only what the legislature says must be done before the government takes property or liberty.

Even then, however, the government must notify the persons affected and afford them some chance to "tell the other side of the story." The timing and quality of notice, the nature of the hearing, these are due process questions. In the next section, we present a famous Supreme Court case on due process, followed by interpretive and explanatory notes. This first section introduces the core of our study and our method in this book. Each unit starts with a problem case, followed by cases and materials for solving it. In reading these, think about the problem case; how does the doctrine fit with your intuitions about due process?

1. *The Process Due: Of Context and Subtext*

Our first case begins with Christine Sniadach. She allegedly owed a bill for some eyeglasses. Her optometrist hired a collection agency, whose lawyer filed suit

demanding the money. The court issued a preliminary order directing Ms. Sniadach's employer to withhold part of her weekly wage of \$63.18, so that there would be a pool of money from which to pay a judgment against her. The procedure that allowed the collection agency to seize part of Ms. Sniadach's wages at the very beginning of the suit is called a garnishment action.

Ms. Sniadach never had a chance to contest the order before it was sent to her employer and her wages were garnished. Represented by the legal arm of the National Association for the Advancement of Colored People (NAACP), Ms. Sniadach took her case to the Supreme Court, arguing that wage garnishment, as practiced in Wisconsin and many other states, denied the debtor due process of law.

The case is short and concerns what may seem to be a minor aspect of debtor-creditor litigation procedure, but it is credited as sparking a revolution in procedural due process. As you read the case, think about the factors that make Sniadach's situation appealing as a test case. And think about why garnishment poses a due process problem at all.

Sniadach v. Family Finance Corp.

395 U.S. 337 (1969)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., her employer, as garnishee. The complaint alleged a claim of \$420 on a promissory note. The garnishee filed its answer stating it had wages of \$63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance¹ and hold the other half subject to the order of the court.

Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower state court in approving the procedure. The case is here on a petition for a writ of certiorari.*

The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee. In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages. What happens in Wisconsin is that the clerk

1. Wis. Stat. § 267.18(2)(a) provides:

When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing in the sum of \$25 in the case of an individual without dependents or \$40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

* [This is the discretionary writ that the Supreme Court issues when it decides it will accept an appeal. — Eds.]

of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey v. Mallonee*, 332 U.S. 245, 253-254 [(1947)]; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 [(1950)]; *Ownbey v. Morgan*, 256 U.S. 94, 110-112 [(1921)]; *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31 [(1928)]. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes 'the right to be heard' (*Schroeder v. New York*, 371 U.S. 208, 212 [(1962)]) within the meaning of procedural due process. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [(1950)]. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S., at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U.S. 820 [(1929)], does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.

Until a recent Act of Congress,⁴ Section 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss:⁵

The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It

4. [The Consumer Credit Protection Act of 1968,] 82 Stat. 146, Act of May 29, 1968.

5. 114 Cong. Rec. 1832.

compels the wage earner, trying to keep his family together, to be driven below the poverty level.

Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:

What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides. 114 Cong. Rec. 1832.

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:

The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges.⁶

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner⁷ is "generally insufficient to support the debtor for any one week."⁸

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall.⁹ Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

6. Comment, Wage Garnishment in Washington—An Empirical Study, 43 Wash. L. Rev. 743, 753 (1968). And see Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759.

7. See n. 1, *supra*.

8. Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759, 767.

9. "For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense, in such a process?" Congressman Gonzales, 114 Cong. Rec. 1833. For the impact of garnishment on personal bankruptcies see H.R. Rep. No. 1040, 90th Cong., 1st Sess., 20-21.

Mr. JUSTICE HARLAN, concurring.

Particularly in light of my Brother Black's dissent, I think it not amiss for me to make explicit the precise basis on which I join the Court's opinion. The "property" of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing. . . .

From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. . . . Apart from special situations, some of which are referred to in this Court's opinion, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). . . .

Mr. JUSTICE BLACK, dissenting.

The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a "most inhuman doctrine"; that it "compels the wage earner, trying to keep his family together, to be driven below the poverty level". . . .

The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be. . . . The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such decisions, I think, should be made by state and federal legislators, and not by this Court. . . .

Every argument implicit in . . . my Brother Harlan's views has been, in my judgment, satisfactorily answered in the opinion of the Supreme Court of Wisconsin in this case—an outstanding opinion on constitutional law. That opinion shows that petitioner was not required to wait until the “culmination of the main suit,” that is, the suit between the creditor and the petitioner. In fact the case now before us was not a final determination of the merits of that controversy but was, in accordance with well-established state court procedure, the result of a motion made by the petitioner to dismiss the garnishment proceedings. With reference to my Brother Harlan's statement that petitioner's deprivation could not be characterized as *de minimis*, it is pertinent to note that the garnishment was served on her and her employer on the same day, November 21, 1966; that she, without waiting for a trial on the merits filed a motion to dismiss the garnishment on December 23, 1966, which motion was denied by the Circuit Court on April 18, 1967; and that it is that judgment which is before us today. The amount of her wages held up by the garnishment was \$31.59. The amount of interest on the wages withheld even if computed at 10% annually would have been about \$3. Whether that would be classified as *de minimis* I do not know and in fact it is not material to know for the decision of this case. . . .

The indebtedness of petitioner was evidenced by a promissory note, but petitioner's affidavit in support of the motion to dismiss, according to the Wisconsin Supreme Court contained no allegation that she is not indebted thereon to the plaintiff. Of course if it had alleged that, or if it had shown in some other way that this was not a good-faith lawsuit against her, the Wisconsin opinion shows that this could have disposed of the whole case on the summary motion.

Another ground of unconstitutionality, according to the state court, was that the Act permitted a defendant to post a bond and secure the release of garnished property and that this provision denied equal protection of the law “to persons of low income.” With reference to this ground, the Wisconsin court said:

Appellant has made no showing that she is a person of low income and unable to post a bond. 37 Wis. 2d, at 167.

Another ground of unconstitutionality urged was that since many employers discharged garnished employees for being unreliable, the law threatened the gainful employment of many wage earners. This contention the Supreme Court of Wisconsin satisfactorily answered by saying that petitioner had “made no showing that her own employer reacted in this manner.”

...

The state court . . . pointed out that the garnishment proceedings did not involve “any final determination of the title to a defendant's property, but merely preserve(d) the status quo thereof pending determination of the principal action.” 37 Wis. 2d, at 169. The court then relied on *McInnes v. McKay*, 127 Me. 110 [(Me. 1928)]. That suit related to a Maine attachment law which, of course, is governed by the same rule as garnishment law. See “garnishment,” *Bouvier's Law Dictionary*; see also *Pennoyer v. Neff*, 95 U.S. 714 (1877). The Maine law was subjected to practically the same challenges that Brother Harlan and the Court raise against this Wisconsin law. About that law the Supreme Court of Maine said:

But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied. 127 Me. 110.

This Court did not even consider the challenge to the Maine law worthy of a Court opinion but affirmed it in a *per curiam* opinion, 279 U.S. 820, on the authority of two prior decisions of this Court.

The Supreme Court of Wisconsin, in upholding the constitutionality of its law also cited the following statement of our Court made in *Rothschild v. Knight*, 184 U.S. 334, 341 [(1902)]:

To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide. . . .

The Supreme Court of Wisconsin properly pointed out:

The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times. 37 Wis. 2d, at 171.

The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 [(1922)]:

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U.S. 94, 104 [(1921)].

The *Ownbey* case, which was one of the two cited by this Court in its *per curiam* affirmation of *McInnes v. McKay*, supra, sustained the constitutionality of a Delaware attachment law. . . .

In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law 'is contrary to public policy'; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision. See my dissent in *Adamson v. California*, 332 U.S. 46, 68 [(1947)]. . . .

NOTE: DUE PROCESS AS NOTICE AND A CHANCE TO BE HEARD

Let's begin by trying to understand why this simple debt collection case launched a revolution in due process. The first step in due process analysis is

to determine whether life, liberty, or property is at stake. In *Sniadach*, it is property—Ms. Sniadach's right to the full use of the wages she had earned. Other classic due process cases have held that various government benefits are a form of property and that the government must give beneficiaries notice and a chance to be heard before these benefits are revoked. In one of the most famous cases, for example, the Court held that due process required notice and a right to be heard prior to the termination of welfare benefits under the federal Aid to Families with Dependent Children program and a parallel state law. *Goldberg v. Kelly*, 397 U.S. 254 (1970). As in *Sniadach*, the Court emphasized in *Goldberg* that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. . . . His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." *Id.* at 264. In our problem case, does the student have a property interest in attending law school, or is it more of a liberty, or associational interest?

Though the short opinion in *Sniadach* spoke only to the peculiar hardships of wage garnishment, it dramatically affected other state procedures regulating the relationship between debtors and creditors. You can anticipate some of the possibilities in Justice Black's concern that the case would affect Maine's procedure for prejudgment "attachment" of property. *Sniadach* had even broader implications because, in any civil suit for money damages, not just breach of contract claims central to debtor-creditor disputes, the defendant is a potential debtor. If she loses, she will owe the plaintiff damages. That means every plaintiff has an incentive to use prejudgment procedures to seize the defendant's assets to satisfy the judgment if she prevails. *Sniadach* thus opened all forms of prejudgment seizure of property to attack.

After *Sniadach* was decided, both the legal community and creditors anxiously awaited the next case. The long legal journey of Margarita Fuentes to the Supreme Court started with her visit to a Legal Services Office in Miami, Florida. See C. Michael Abbott and Donald C. Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 Iowa L. Rev. 955 (1972). Fuentes had purchased a stove and a stereo and fallen behind on her payments. One day the sheriff came to her house waving a writ of replevin, unplugged both items, and carted them away. Again the Court wrote broadly and based its decision squarely on the lack of notice before seizure of the property. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding that prejudgment replevin without notice and opportunity to be heard violates due process).

Though the Florida statute was called "replevin," it was like the provisions of virtually all states that allowed pretrial repossession of property in which both creditor and debtor had some interest. In Louisiana the procedure allowing prejudgment attachment of property was entitled "sequestration." Just two years after *Fuentes*, that statute was upheld. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Lawrence Mitchell allegedly owed \$574.17 on a stove, stereo, refrigerator, and washing machine when they were seized from him.

In an unusually bitter dissent, Justice Stewart, writing for three members of the Court, said that *Mitchell* was "constitutionally indistinguishable from *Fuentes*." *Id.* at 634 (Stewart, J., dissenting). But the majority found that the Louisiana statute

was saved by provisions for the exercise of real judicial discretion in issuing prejudgment orders, the posting of a bond, and a quick postseizure hearing.

Essentially, *Mitchell* held that it was possible for creditors' remedies to pass constitutional muster. But the final case in the series, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), holding Georgia's prejudgment attachment statute unconstitutional, made plain that due process scrutiny was still alive:

Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.

Id. at 606.

For almost 20 years, the Supreme Court did not take another prejudgment remedies case. In the meantime, state legislatures scrambled to revise their procedures to better balance the interests of creditors, debtors, plaintiffs, defendants, and commercial actors.

One state's efforts to update its prejudgment remedies were in the background of the 1991 Supreme Court opinion in *Connecticut v. Doebr*, 501 U.S. 1 (1991). In that case, a personal quarrel led to the placing of a lien on Doebr's house in connection with a tort action for assault and battery. A lien prevents the sale of the property and can also obstruct the use of the property as collateral on a loan. Relying on the *Sniadach* line, the Court held that, as applied in this case, the Connecticut statute violated due process.

Though it revived procedural due process in a rather dramatic way, *Doebr* was different because it involved real property. All the prior cases had dealt with some form of personal property and the physical seizure of the property itself, which triggered due process concerns. In *Shaumyan v. O'Neill*, 987 F.2d 122 (2d Cir. 1993), the Second Circuit upheld the application of the same Connecticut statute involved in *Doebr* in a case where homeowners were dissatisfied with painting and repairs on their house and refused to pay. The contractors sued in state court and obtained an attachment of the home without either a prior hearing or the posting of a bond. Can you see a distinction in the relationship between the defendant's home and the cause of action in each of these two cases? In *Shaumyan*, it matters that the lien is tied to a dispute about work done on the house.

Think about the interaction of legislatures and courts that this set of cases illustrates. Does it seem like a good way for the legal system to operate, or do you agree with the judge who dissented from the Second Circuit's earlier holding that the *Doebr* statute was unconstitutional? He wrote:

The Due Process Clause is not a code of civil procedure. . . . An *ex parte* prejudgment attachment of real estate does not deprive the owner of any possessory rights in his property. At most, it impairs the market value of the property during the brief interval between the *ex parte* attachment and the "expeditious" adversary hearing required by state law. . . .

Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990) (Newman, J., dissenting).

Note how much the personnel of the Court has changed since *Sniadach* was decided. Almost three decades later, Justice Scalia wrote for a unanimous Court in *Gilbert v. Homar*, 520 U.S. 924 (1997), that a state university's failure to provide notice and a hearing before suspending a university police officer without pay did not violate the officer's right to due process. The officer had been arrested and formally charged with a felony drug charge, which was dropped a few days later. The modern Court has also held that a hearing is not constitutionally required before seizing and retaining property in civil forfeiture proceedings incident to criminal drug arrests. *Culley v. Marshall*, 601 U.S. 377 (2024). Alabama law provides that a car owner can recover a vehicle seized incident to a drug trafficking arrest by posting bond at double the car's value or by following procedures to establish that the owner "lacked knowledge of the car's connection to the drug crime." *Id.* at 381. In two cases where car owners loaned their vehicles to a friend and relative who were arrested transporting illegal contraband, officers seized the cars, and the state promptly filed forfeiture complaints with the owners. Neither owner could afford to post bond. They eventually prevailed months later in state court forfeiture hearings by establishing that they lacked knowledge of their cars' use in criminal activity. In a federal class action lawsuit they argued that due process required a preliminary hearing shortly after the cars were seized so owners who were likely innocent could recover them pending a full hearing.

The Supreme Court held that due process does not require a preliminary hearing to determine the likelihood of success of the state's forfeiture claim before the full forfeiture hearing already provided by state law. The Court emphasized that "most States and the Federal Government do not currently provide preliminary hearings in civil forfeiture cases," so creating a "constitutional dictate would necessitate a major change in . . . longstanding practices" that would run afoul of precedent. *Id.* at 385 (citing *United States v. Von Neumann*, 474 U.S. 242 (1986), which rejected the claim that a 36-day delay in considering 'remission of forfeiture' petition prior to a full forfeiture hearing over seizure of car violated due process; and *United States v. \$8,850*, which upheld an 18-month delay in a forfeiture hearing regarding the seizure of currency as reasonable in light of related administrative and criminal proceedings). The Court held that all due process requires is a reasonably timely post-seizure hearing. The Court did not apply *Mathews* balancing, but noted that, if it did, the additional hearing sought by the plaintiffs "would interfere with the government's important law-enforcement activities in the period after the seizure and before the forfeiture hearing." *Id.* (distinguishing *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that notice and a hearing are required before seizing real property subject to civil forfeiture which cannot be moved or concealed during forfeiture litigation)).

Justice Gorsuch joined the majority opinion but wrote separately to note that civil forfeiture has blossomed since the "war on drugs" of the 1970s and 1980s and is now a "booming business" for state and federal governments, generating \$2.5 billion for the federal government's law enforcement agencies alone, even though as many as "80% of civil forfeitures are not accompanied by a criminal conviction." *Id.* at 395. He also noted that when local law enforcement budgets "tighten, forfeiture activity often increases," and officers often focus on small amounts of cash, hoping to avoid litigation "because the cost of litigating to retrieve the property

may cost more than the value of the property itself.” Id. at 396. Delay also works to the advantage of officers because “even innocent owners sometimes settle” because if they need property like a car for work and family, paying a fee to get it back is faster than waiting for the uncertain outcome of a forfeiture hearing. Id. “Perhaps it is past time for this Court to examine more fully whether and to what degree civil forfeiture practices align” with due process. Id. at 401. Justices Sotomayor, Kagan, and Jackson dissented, emphasizing that seizures of property “from Black and Hispanic arrestees increases with the size of the [budget] deficit in states where police departments can retain revenue from seized property,” that loss of property such as a car can lead to loss of a job and difficulties accessing necessities, healthcare, and family, and that forfeiture hearing procedures often provide for automatic forfeiture if the owner makes a single procedural error, such as missing a conference scheduled during work hours. Id. at 406. The dissent distinguished *Von Neumann* and \$8,850 on the ground that they involved owners concerned about delay, but who did not claim they were “innocent owners of property used for criminal ends without their knowledge.” Id. at 409.

NOTE: PRIVATE ACTORS AND DUE PROCESS

In the previous note, we learned that due process applies only to deprivations of life, liberty, or property. A second basic requirement is state action — only the government is required by the Constitution to render due process in its dealings. In the problem case, we do not specify whether the university is public or private, but a private university is not bound by the Due Process Clause.

As you will learn in other courses, the line between private and official conduct is sometimes blurred, making it difficult to determine whether state action is present. In general, you may assume that when the challenged actions are those of the government itself, such as the admission decisions of a public (but not private) institution, then they satisfy state action and thereby may implicate constitutional rights. Actions by others do not generally implicate constitutional rights. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding there was no state action in the sale of a debtor’s goods by a private warehouse that had the goods in its possession and under state law had a lien for unpaid storage charges). This does not mean that private actions are *legal* simply because they are beyond constitutional reach. On the contrary, actions that would be unconstitutional in the public sector may be unlawful in private spheres based on statutory, contract, tort, or other law.

NOTE: THE *MATHEWS* TEST

Once a deprivation of life, liberty, or property occurs as a result of state action, the due process analysis shifts to a balancing test. Can you see what interests the Court weighed in *Sniadach*? Does it matter whether the creditor is right that Ms. Sniadach owes the money for the glasses? Against what ideals of fair procedure is the Court judging the Wisconsin garnishment statute?

The modern balancing test for determining when notice and a hearing must precede the deprivation of life, liberty, or property is set out in *Mathews v. Eldridge*,

424 U.S. 319 (1976). In that case, the Court considered whether an evidentiary hearing must precede the termination of Social Security disability benefits. The Court set out the balancing test as follows:

... In *Fuentes v. Shevin*, 407 U.S., at 96-97, the Court said only that, in a replevin suit between two private parties, the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell v. Burson*, 402 U.S., at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the pre-revocation hearing involve a probable cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). More recently, in *Arnett v. Kennedy*, *supra*, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S. at 142-146.

These decisions underscore the truism that "[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*

424 U.S. at 333-335 (emphasis added). Applying these factors, the Court held that no evidentiary hearing was necessary before the government terminated Social Security disability payments because there is an "elaborate" agency review process in which the beneficiary is given notice of the proposed termination, has an opportunity to review the relevant medical reports and other evidence in the case file, and is allowed to submit additional evidence and respond in writing before the termination decision is made. *Id.* at 338-340.

Unlike in *Goldberg*, the Court emphasized, "[e]ligibility for disability benefits . . . is not based upon financial need," so the "disabled worker's need is likely to be less than that of a welfare recipient" and "[i]n addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level." *Id.* at 340-342. The risk of error in existing procedures was

relatively low in the Court's view because a medical assessment is a more "easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity are often crucial to the decisionmaking process." *Id.* at 343-344. The government's interest in "conserving scarce fiscal and administrative resources" was significant (every dollar that goes to an undeserving beneficiary diminishes the resources for those who truly need it), and the Court emphasized the "wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. The judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decisionmaking in all circumstances.' *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). . . . The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring)." *Id.* at 348-349.

The *Mathews* balancing test is the culmination of a profound evolution in thought about what constitutes due process of law—an evolution that finds its origin in the Magna Carta. Chapter 39 of that charter of rights provides:

No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Chapter 40 provides that "[t]o no one will we sell, to no one deny or delay right or justice." Toni M. Massaro and E. Thomas Sullivan emphasize that in early English constitutional thought, "[i]t was not until a 1354 reissue of the charter that the phrase 'due process of law' was included, but by the end of the fourteenth century the due process check against arbitrary government forces was firmly established within the charter." Toni M. Massaro and E. Thomas Sullivan, *The Arc of Due Process in American Constitutional Law* 7 (2013). Even then, "development of a truly robust rule of law structure with due process protections did not take place . . . because of the influence of divine right" and deference to parliament—English courts assumed that the process parliament authorized was the process that was "due." *Id.* at 8.

In the United States, Massaro and Sullivan continue, the earliest treatments of due process by courts

held that the law of the land was simply a guarantee that citizens would be subject to whatever laws had been passed by the legislature, and that they would not be subject to foreign or arbitrary power.

Id. at 81-82. Notice that, on this view of procedural due process (that whatever process the legislature sets out is "due") *Ms. Sniadach* would have no recourse against the Wisconsin garnishment statute. "This limited interpretation eventually fell from common use . . . even though it occasionally found support from certain members of the Court. . . ." *Id.* at 82. The first major shift in the nineteenth century was the development of a historical test that examined the challenged procedure against

"those settled usages and modes of proceeding existing in the common and statute law of England . . . which were shown not to have been unsuited to their civil and political condition." *Id.* at 83. Could *Ms. Sniadach* have prevailed on this "settled usages" test?

What kinds of settled usages, other than those embedded in statutes, might a court look to? See Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 *Yale J.L. & Hum.* 311 (2012) ("Due process . . . has a readily identifiable spatial structure with deep historical and cultural resonance. It is the trial courtroom. And notwithstanding perennial accusations that due process of law is a guarantee of ' . . . indefinite content,' courts and legal commentators have systematically relied upon the courtroom trial as an organizing metaphor. . . . [M]odern courts are constantly imagining the adversarial space of the trial courtroom as they decide what procedures should govern pre-trial procedures, alternative forms of dispute resolution, and the operation of the modern administrative state.").

The modern *Mathews* balancing test, Massaro and Sullivan emphasize, developed gradually over the course of the twentieth century without ever completely displacing the "settled usages" approach. Massaro and Sullivan, *supra*, at 87. They point in particular to the significance of Justice Frankfurter's distillation of the virtues of a more flexible approach in his concurring opinion in a case relied on by the majority in *Mathews*, by Justice Harlan in his attempt to answer Justice Black's dissent in *Sniadach*, and in many other cases:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 86-87 (quoting *Joint Anti-Fascist Comm.*, 341 U.S. at 162-163 (Frankfurter, J., concurring)).

As Massaro and Sullivan conclude, "[d]espite the changes in the standard for determining what process is due for an individual in a certain context over time, the purpose of these procedures has remained the same: to assure that the government makes fair and accurate adjudicatory decisions." *Id.* at 88.

NOTE: CRITIQUES OF DUE PROCESS BALANCING

As we will see shortly in cases concerning the right to counsel, the balancing mandated by *Mathews* often comes out in favor of the government and of restricted

rather than elaborate process. *Mathews* itself is an example of that. The Court concluded that due process does not demand an evidentiary hearing. A more recent example is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). After the attacks of September 11, 2001 by the al Qaeda terrorist network, the United States invaded Afghanistan. An American citizen, Yaser Esam Hamdi, was captured on the field of battle by the Northern Alliance and turned over to the U.S. military. He was detained and interrogated in Afghanistan before being transferred to the naval base in Guantanamo Bay, Cuba, in January 2002. When his U.S. citizenship was confirmed a few months later he was transferred to a naval brig in Charleston, South Carolina. Hamdi's father challenged his son's detention by filing an action in federal court asserting that his son had been in Afghanistan to do relief work, that he had been in the country less than two months before being captured, and that he was not properly classified as an "enemy combatant." The government responded by filing a declaration by an intelligence officer asserting that Hamdi was "affiliated" with the Taliban.

The central question was what procedures the government had to follow in determining whether Hamdi was indeed an enemy combatant. Justice O'Connor, writing for a plurality, applied the *Mathews* balancing test and concluded that while the government had to provide an evidentiary hearing to protect Hamdi's liberty interest in establishing that he was not subject to indefinite detention as an enemy combatant, hearsay should be allowed, the government should enjoy a presumption in favor of its evidence, and the adjudicator need not be a judicial officer. These procedural modifications, Justice O'Connor concluded, were necessary to protect the government's national security interests in a time of war.

A few months after the case was decided, the government released Hamdi from the naval brig under negotiated terms. By that time, Hamdi had been detained without charges for almost three years. To secure his release, Hamdi agreed to give up his U.S. citizenship, to be deported to Saudi Arabia, and to abide by travel restrictions prohibiting him from returning to the United States or going to Israel, the West Bank, the Gaza Strip, Syria, Afghanistan, or Pakistan. He also was required to waive any right to sue the United States for the harm caused by his detention.

Justices Scalia and Stevens, an unlikely duo, dissented on the ground that a U.S. citizen either must be charged and tried or released. Far from providing a reliable measure of due process, they complained, *Mathews* balancing invites the Court "to prescribe what procedural protections *it* thinks appropriate" and adopt a "Mr. Fix-it Mentality" well beyond the competence and authority of the judicial branch. *Id.* at 575-576 (Scalia, J., dissenting) (emphasis in original). Justice Thomas's separate dissent in *Hamdi* attacked the balancing test as well. He argued that due process balancing has no place in matters of national security. And even if it were applicable, he added, the plurality got the balance wrong by giving excessive weight to Hamdi's interests and insufficient weight to government interests. His dissent parallels arguments Justice Rehnquist once raised regarding the subjectivity of the *Mathews* factors:

In *Goldberg* we required a full-fledged trial-type hearing, and in *Mathews* we declined to require any pretermination process other than those required by the statute. At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired. . . . The

lack of any principled standards in this area means that these procedural due process cases will recur time and again. Every different set of facts will present a new issue on what process was due and when.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 562, n.* (1985) (Rehnquist, J., dissenting) (emphasis added). You can see that, although Justice Black provided the lone dissent in *Sniadach*, his concerns about expanding procedural due process protections based on the sentiments of individual Justices have resonated with the modern Court.

There are equally strong criticisms of the *Mathews* balancing test from the left. Professor Jerry Mashaw's critique has been particularly influential. See Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976). His primary concern is that the Court's account of the values of due process was incomplete. Due process is not only about the risk of error, but also about individual dignity, equality, and tradition. Yet nothing in *Mathews* refers to these important aspects of "fair procedure." Moreover, although the due process calculus set forth in *Mathews* appears scientific, it actually is highly subjective and manipulable—here liberal and conservative critiques meet. How is the judge to measure the risk of error referred to in the test? As Mashaw says, "the calculus asks unanswerable questions. For example, what is the social value, and the social cost, of continuing disability payments until after an oral hearing for persons initially determined to be ineligible?" Id. at 48. Finally, Mashaw argues that the Bill of Rights is "meant to insure individual liberty in the face of contrary collective action." Id. at 49. This suggests that the *Mathews* calculus is focusing on constitutionally irrelevant factors by emphasizing state interest rather than individual liberty.

Yet this critique may ignore the positive features of *Mathews*, especially its realistic appraisal of the significance of procedural costs to procedural rights, and of how any basic constitutional test must be flexible enough to apply to a vast range of due process scenarios. Particularly in the context of administrative law, which *Mathews* addressed, procedural costs must be taken seriously, given the number of hearings involved. Moreover, one must consider that administrative procedures are intended to be an alternative to civil litigation. If due process is construed to require a full-blown adversary hearing in every instance, then most alternative forms of dispute resolution would violate due process.

Of course, taken too far, administrative adjudication can replace trials in independent courts with resolution by the executive branch on terms that serve the interests of the executive branch. See Norman W. Spaulding, *Due Process Without Judicial Process*, 85 Fordham L. Rev. 2249, 2252-2253 (2017) (describing desire of New Deal proponents of administrative state to relegate courts "to a subordinate role in American Law" and to "circumvent judicial review" of agency action). This has become a persistent complaint in areas such as immigration law because the first "courts" to hear asylum and removal cases are administrative courts staffed and supervised by the Attorney General. See Maria Sacchetti, *Immigration Judges' Union Calls for Immigration Court Independent from Justice Dept.*, Wash. Post, Sept. 21, 2018 (reporting that the Attorney General removed judges who challenged the fairness of notice given to immigrants of their hearings, limited judge's power to grant immigrants time to locate counsel or gather evidence, and imposed

a “production quota” of at least 700 cases a year that “undermin[ed] judicial independence and immigrants’ rights to a fair hearing”); Adrienne Pon, Note, Identifying Limits to Immigration Detention Transfers and Venue, 71 Stan. L. Rev. 747 (2019); Emily Ryo, Detention as Deterrence, 71 Stan. L. Rev. Online 237 (2019) (describing procedural burdens that prevent immigrants from pursuing judicial review of meritorious claims for relief).

NOTE: DUE PROCESS AND POST-JUDGMENT REMEDIES

Sniadach was decided in 1969, five years after President Johnson declared an “unconditional war” on poverty in his State of the Union address. The series of legislative initiatives that followed to “relieve the symptoms of poverty . . . and, above all, to prevent it,” have been condemned as “a catastrophe” by critics and praised as expressing our deep commitment as a society to the “dignity and potential of every human being” by others. See Dylan Matthews, Everything You Need to Know About the War on Poverty, Wash. Post., Jan. 8, 2014. One of the reasons the NAACP became involved in cases like Ms. *Sniadach*’s is that civil rights leaders saw the potential of the president’s initiative to unify social movements—a policy that could advance civil rights by addressing broader legal and social conditions that perpetuate economic disparities. Part of the most vigorous exchanges among the Justices in *Sniadach* concerns whether the majority was using the Due Process Clause of the Fourteenth Amendment in the service of the war on poverty.

In the wake of the Great Recession of 2008 and the recession caused by COVID-19, attention has returned to widespread economic disparities and racial injustice in debtor-creditor relations. The excerpt that follows is part of a civil complaint, the pleading filed to initiate a lawsuit, drafted by the Civil Advocacy Clinics at the Saint Louis University School of Law and other public interest lawyers. This particular complaint involves debt collection practices by a city bordering Ferguson, Missouri. After issuing traffic citations and fines for other minor violations of the municipal code, the City of Jennings holds indigent defendants who cannot afford bail in custody until they agree to plead guilty. The guilty plea is then used as the basis for a *civil* judgment requiring payment of the fines, fees, costs, and late payment penalties. In order to collect, the city issues arrest warrants for non-payment and missed payments and holds arrestees in indefinite detention in its municipal jails to induce them to pay. Because the city budget depends in part on the revenue from its fines and penalties, it has a strong incentive to use aggressive collection practices.

Information about these practices came to light after the Department of Justice published its report on widespread racial discrimination in the administration of criminal justice in and around Ferguson. One of the findings of the DOJ Report on Ferguson was that severe funding shortages and racial discrimination led the court to become parasitic on the population it was supposed to serve. “The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests. This has led to court practices that violate the Fourteenth Amendment’s due process and equal protection requirements. The court’s practices . . . impose unnecessary

Ctr. 2020). State court proceedings generally involve relatively low recovery cases, as judged by damage awards. See Zambrano, Federal Aggrandizement (“75 percent of state-court cases involve damage awards of less than \$5,000”; in 2015, the median damage award in federal court was \$60,000, the average \$1.4 million). Moreover, the “vast majority of civil cases . . . in state courts are debt collection, landlord/tenant, foreclosure, and small claim cases.” The Landscape of Civil Litigation in State Courts, Civil Justice Initiative, National Center for State Courts (2015). Creditors, landlords, and banks are typically plaintiffs in these cases, and they prefer state courts “for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments [and] a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings.” *Id.*

Combined with the power to imprison for non-payment and the fact that most defendants are self-represented (“[e]ven if defendants might have the financial resources to hire a lawyer to defend them in court, most would not because the cost of the lawyer exceeds the potential judgment”), *id.*, it is clear that the gap between what the Court imagined in *Snidach* and what happens on the ground remains dauntingly wide. “The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.” *Id.* at vi. See also Norman W. Spaulding, The Ideal and the Actual in Procedural Due Process, 48 Constitutional Law Quarterly 2 (2020).

In the materials that follow, we will study close cases and rich debates about the cost, efficiency, and ethical integrity of the adversary system. *Jenkins* is a reminder at the very start of those studies that there are profound reasons tied to human dignity why the guarantee of due process appears twice in the Constitution.

2. Notice: The Constitutional Dimension

PROBLEM CASE: THE ELUSIVE DEFENDANT

You are a lawyer consulted by Paulette Peinture, who has a grievance against Gisele Fourchette, international art dealer and all-around world citizen. Peinture was employed to redecorate Fourchette’s fabulous condominium for \$1 million dollars. Some weeks into the work, Fourchette suddenly shouted, “I loathe this faux belle époque junk,” and shoved the decorator, causing her to fall and dislocate her shoulder. Fourchette then picked up a vase on loan from a gallery and smashed it against the newly papered wall. In ordering Peinture out of the apartment forever, Fourchette said she didn’t intend to pay for the work previously done. Peinture’s assistant witnessed these events.

Fourchette has the lifestyle of a very rich woman, but preliminary investigation shows few liquid assets. On the other hand, she owns three late-model luxury cars and the condominium and undoubtedly has some money in a local checking account. Although a resident of the state, she retains her Swiss citizenship and has five other residences all over the world. The incident itself suggests a certain instability and Fourchette’s frequent travels might make her difficult to bring to court.

Nevertheless, you decide to file suit in federal district court in your state claiming damages for breach of contract and tortious assault. You tell your associate to

do everything possible to make sure Fourchette has adequate notice, starting (but not concluding) with meeting the requirements of Fed. R. Civ. P. 4.

Your associate first scanned Rule 4 and mailed a copy of the summons to Fourchette at the condominium address. He then faxed a copy of the summons to her condominium, as well as to three art galleries in town where Fourchette is known to have business dealings. He also sent her an e-mail greeting card with the message, "You are being sued" and the law firm's return number on it.

Not satisfied that he had done everything possible, your associate hired a company called "You Sue, We Deliver" to effect in-hand service. The company took the papers to the condominium address, where they were met at the door by Roxanne DeSilva, Fourchette's elderly housekeeper, one of five assistants at the place. DeSilva would later testify that she took some papers from "a kid, a teenager who couldn't be more than 16 years old."

When he learned that Fourchette was in town as a defendant in an unrelated criminal trial, your associate mailed a copy of the summons and complaint to Fourchette's lawyer in that case. Even more ingeniously, he employed an actor to pose as a birthday messenger to deliver the papers to Fourchette on the courthouse steps as she emerged from the criminal trial. Singing "A Summons and Complaint Just for You" to a familiar tune, the actor gave, and Fourchette took, a birthday cake, under which the papers rested.

Fourchette has now moved to dismiss the complaint on the basis that she did not receive proper notice and was therefore denied due process of law. Federal courts have interpreted Rule 4(e)(2)(B) to permit service of process against a person who has multiple homes if the "dwelling house or usual place of abode" selected by the plaintiff has "sufficient indicia of permanence." See *National Development Co. v. Triad Holding Corp. & Adnan Khashoggi*, 930 F.2d 253 (2d Cir. 1991) (service upheld against citizen of Saudi Arabia at multi-million dollar New York City apartment owned for fifteen years, elaborately remodeled, and listed as a residence on bail application in connection with a separate criminal matter; defendant claimed he "resided" in a ten-acre, six-villa compound in Riyadh, and that the New York apartment was just one of twelve locations around the world where he passed time, but was staying in New York when his housekeeper was served). How will you respond to the motion that she has been denied due process in this action?

Greene v. Lindsey

456 U.S. 444 (1982)

JUSTICE BRENNAN delivered the opinion of the Court.

Appellees Linnie Lindsey, Barbara Hodgens, and Pamela Ray are tenants in a Louisville, Ky., housing project. Appellants are the Sheriff of Jefferson County, Ky., and certain unnamed Deputy Sheriffs charged with responsibility for serving process in forcible entry and detainer actions. In 1975, the Housing Authority of Louisville initiated detainer actions against each of appellees, seeking repossession of their apartments. Service of process was made pursuant to Ky. Rev. Stat. § 454.030 (1975), which states:

If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

In each instance, notice took the form of posting a copy of the writ of forcible entry and detainer on the door of the tenant's apartment.¹ Appellees claim never to have seen these posted summonses; they state that they did not learn of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them, and after their opportunity for appeal had lapsed.

Thus without recourse in the state courts, appellees filed this suit as a class action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U.S.C. § 1983.* They claimed that the notice procedure employed as a predicate to these eviction proceedings did not satisfy the minimum standards of constitutionally adequate notice described in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and that the Commonwealth of Kentucky had thus failed to afford them the due process of law guaranteed by the Fourteenth Amendment. Named as defendants were the Housing Authority of Louisville, several public officials charged with responsibility over particular Louisville public housing projects, Joseph Greene, the Jefferson County Sheriff, and certain known and unknown Deputy Sheriffs.

On cross-motions for summary judgment, the District Court granted judgment for appellants. In an unreported opinion, the court noted that some 70 years earlier, in *Weber v. Grand Lodge of Kentucky, F. & A.M.*, 169 F. 522 (1909), the Court of Appeals for the Sixth Circuit had held that constructive notice by posting on the door of a building, pursuant to the predecessor statute to § 454.030, provided an adequate constitutional basis upon which to commence an eviction

1. "Posting" refers to the practice of placing the writ on the property by use of a thumb-tack, adhesive tape, or other means. App. 74, 77 (deposition of process servers). Appellants describe the usual method of effecting service pursuant to § 454.030 in the following terms: The officer of the court who is charged with serving notice in a forcible entry and detainer action, usually a Jefferson County Deputy Sheriff, takes the following steps in notifying a tenant. First the officer goes to the apartment in an effort to effectuate personal in-hand service. Second, if the named tenant is absent or will not appear at the door, personal in-hand service is made on any member of the tenant's family over sixteen years of age. Finally, if no one answers the door, a copy of the notice is posted on the premises, usually the door. Brief for Appellants 3.

* [Section 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." —EDS.]

action, on the ground that it was reasonable for the State to presume that a notice posted on the door of the building in dispute would give the tenant actual notice in time to contest the action. Although the District Court recognized that "conditions have changed since the decision in *Weber* . . . and . . . that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants," App. 41-42, the court nevertheless concluded that the procedures employed did not deny due process in light of the fact "that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises," *id.* at 42.

The Court of Appeals for the Sixth Circuit reversed the grant of summary judgment in favor of appellants and remanded the case for further proceedings. . . .² We noted probable jurisdiction, 454 U.S. 938 (1981), and now affirm.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane*, *supra*, at 314. Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*. *McDonald v. Mabee*, 243 U.S. 90, 92 (1917). Nevertheless, certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance, we have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that the Due Process Clause does prescribe a constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*" *Mullane*, 339 U.S. at 314 (emphasis added). It is against this standard that we evaluate the procedures employed in this case. . . .

It is, of course, reasonable to assume that a property owner will maintain superintendence of his property, and to presume that actions physically disturbing his holding will come to his attention. See *Mullane*, *supra*, at 316. The frequent restatement of this rule impresses upon the property owner the fact that a failure to maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the

2. The Court of Appeals concluded that "[r]equiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circumscribed." 649 F.2d, at 428. The court then noted with approval the provisions of the New York counterpart of § 454.030, which provides that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *Ibid.*, citing *Velazquez v. Thompson*, 451 F.2d 202, 205 (2d Cir. 1971).

empirical foundation of the principle. Upon this understanding, a State may in turn conclude that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests.

The empirical basis of the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings would appear to make the presumption particularly well founded where notice is posted at a residence. With respect to claims affecting the continued possession of that residence, the application of this presumption seems particularly apt: If the tenant has a continuing interest in maintaining possession of the property for his use and occupancy, he might reasonably be expected to frequent the premises; if he no longer occupies the premises, then the injury that might result from his not having received actual notice as a consequence of the posted notice is reduced. Short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting pursuant to the provisions of § 454.030 results in a failure to provide actual notice to the tenant concerned. Indeed, appellees claim to have suffered precisely such a failure of actual notice. As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they could have their intended effect. Under these conditions, notice by posting on the apartment door cannot be considered a "reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane*, 339 U.S. at 315.

Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen. *Ibid.* In this connection, we reject appellants' characterization of the procedure contemplated by § 454.030 as one in which "posting" is used as a method of service only as a last resort." To be sure, the statute requires the officer serving notice to make a visit to the tenant's home and to attempt to serve the writ personally on the tenant or some member of his family. But if no one is at home at the time of that visit, as is apparently true in a "good percentage" of cases, posting follows forthwith. Neither the statute, nor the practice of the process servers, makes provision for even a second attempt at personal service, perhaps at some time of day when the tenant is more likely to be at home. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be held constitutionally adequate. Cf. *Mullane*, 339 U.S., at 317-318.

As noted by the Court of Appeals, and as we noted in *Mullane*, the mails provide an "efficient and inexpensive means of communication," *id.*, at 319, upon which prudent men will ordinarily rely in the conduct of important affairs, *id.*, at 319-320. Notice by mail in the circumstances of this case would surely go a long

way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy. Particularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings. We need not go so far as to insist that in order to "dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required," *McDonald v. Mabee*, 243 U.S., 90, 92 (1917), in order to recognize that where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice "reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane*, *supra*, at 319.

We conclude that in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment. The judgment of the Court of Appeals is therefore *Affirmed*.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

Today, the Court holds that the Constitution prefers the use of the Postal Service to posted notice. The Court reaches this conclusion despite the total absence of any evidence in the record regarding the speed and reliability of the mails. The sole ground for the Court's result is the scant and conflicting testimony of a handful of process servers in Kentucky. On this flimsy basis, the Court confidently overturns the work of the Kentucky Legislature and, by implication, that of at least 10 other States. I must respectfully dissent. . . .

Kentucky's forcible entry and detainer action is a summary proceeding for quickly determining whether or not a landlord has the right to immediate possession of leased premises and, if so, for enabling the landlord speedily to obtain the property from the person in wrongful possession. Ky. Rev. Stat. §§ 383.200, 383.210 (1972). As this Court has recognized, such circumstances call for special procedures:

There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. *Lindsey v. Normet*, 405 U.S. 56, 72-73 (1972).

The means chosen for making service of process, therefore, must be prompt and certain, for otherwise the principal purpose of a forcible entry and detainer action could be thwarted before the judicial proceedings even began.

The Kentucky statute meets this need. . . .

The Court, however, holds that notice via the mails is so far superior to posted notice that the difference is of constitutional dimension. How the Court reaches this judgment remains a mystery, especially since the Court is unable, on the present record, to evaluate the risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft. Furthermore, the advantages of the mails over posting, if any, are far from obvious. It is no secret, after all, that unattended mailboxes are subject to plunder by thieves. Moreover, unlike the use of the mails, posting notice at least gives assurance that the notice has gotten as far as the tenant's door.

NOTES AND QUESTIONS

1. Note that the Court in *Greene* did not hold that posting is always unconstitutional; rather, the circumstances were such that posting was an unreliable method of service in light of the available alternatives.

2. An important lesson to draw from *Greene* is that when the method of notice is at issue *Mathews* is not how the Court conducts due process analysis. Two due process tests are discussed by the majority in *Greene* and neither is the *Mathews* balancing test. Can you identify them? First, as the majority emphasized, and as every case since has held, the method of notice must be reasonably likely under the circumstances to inform the defendant that its rights are being adjudicated. But service by posting has a long historical pedigree. As the majority concedes, if due process is informed by one's reasonable expectations about the process due, including the notice due, then the long history of permitting notice by posting suggests that the practice would be constitutional in many cases. This is the second approach — sometimes called the historical test. As you saw in Justice Harlan's concurring opinion in *Snidach*, and as you will see in connection with personal jurisdiction later in the chapter, some members of the modern Court believe that traditional practices are extremely important measures of due process. Revisit this question after you have read *Burnham v. Superior Court*, 495 U.S. 604 (1990), *infra*.

3. *Greene* discusses notice in the context of evictions, one of the most common and high stakes events that can land someone in court. Evictions can be life-changing for a family, and the property law involved can be so complex that most tenants cannot adequately understand it. For example, a tenant may not know they have the right to withhold payment of rent due to the landlord's failure to maintain the property in livable condition. And, beyond the substance, the legal procedures governing landlord-tenant cases can be difficult to navigate.

During the COVID-19 pandemic, cities all around the country imposed temporary eviction moratoria, many of which lapsed in early 2022. The result has been a backlog of pandemic-related evictions that threaten to overwhelm the nation's housing courts, forcing policymakers to take a closer look at the often unjust procedures tenants face in these venues. See Erika Rickard & Natasha Khwaja, *State Policymakers Are Working to Change How Courts Handle Eviction Cases* (Pew Research

Ctr. 2021) (providing an overview of state-level reforms). In 2017, New York City enacted Local Law 136, a first-in-the-nation statute committed to providing access to free legal services to all tenants facing eviction proceedings whose household income is at or below 200% of the Federal Poverty Guidelines. This “Right to Counsel” law was heralded as a new approach to meeting the legal needs of city residents, but in the wake of the pandemic, there were not enough lawyers to meet the needs of over 2,500 eligible tenants facing eviction when the city’s moratorium expired in January 2022. See Chris Sommerfeldt, NYC Borough Presidents Demand ‘Right to Counsel’ Safeguards in Housing Court, N.Y. DAILY NEWS, May 30, 2022. After reading *Lassiter* and the related notes, *infra*, consider the question posed on page 76: “At what point are lawyers necessary to fundamental fairness?”

NOTE: MULLANE v. CENTRAL HANOVER BANK AND TR. CO.

The practice of serving individuals by publication was rendered constitutionally suspect in *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950), the principal case relied on by the majority in *Greene*. *Mullane* involved a common trust fund administered by the Central Hanover Bank. The New York banking statute permitted smaller trust estates to be pooled into a larger fund, enabling small investors to afford professional money managers. When each participating smaller trust fund first invested in the common fund, known beneficiaries of the pooled trust were mailed notice of the procedure for creating and managing the pooled trust. State law also required the trustee of the fund to petition the New York Surrogate Court to audit its activities. Pursuant to statute, the trustee gave notice of the audit petition by publishing it in a local newspaper.

Mullane challenged the audit proceeding on the grounds that notice had not been served on *nonresident* beneficiaries of the trust and that notice by publication violated due process because nonresidents had no access to local newspapers in the state. The Court held that the statutory notice by publication was adequate only for those beneficiaries whose whereabouts were genuinely unknown or whose rights were conjectural when the action began. *Known* beneficiaries, whose whereabouts were reasonably ascertainable, were entitled to notice by mail.

The Court in *Mullane* also set forth the general standard for constitutionally sufficient notice that appears in *Greene*. The Supreme Court has continued to invoke the standard of *Mullane*—notice “reasonably calculated” to apprise interested parties—in a wide range of notice settings. In *Dusenbery v. United States*, 534 U.S. 161 (2002), the Court held, in a 5-4 decision, that notice by certified mail is sufficient to put a prisoner on notice of the administrative forfeiture of cash and other property seized at the time of his arrest on charges of drug possession. These civil asset forfeiture proceedings are commonly pursued by the government in association with criminal charges. See Adam Liptak and Shaila Dewan, Supreme Court Limits Police Powers to Seize Private Property, N.Y. Times, Feb. 20, 2019. The prisoner claimed he did not receive the certified letter, and that the Bureau of Prisons could have assured actual delivery of the letter to him while he was incarcerated. The majority disagreed, observing that actual notice is not required by *Mullane* and that the methods used were reasonably certain to inform the prisoner. Emphasizing that *Mullane*, not *Mathews* balancing, governs the analysis of the adequacy of

notice, 534 U.S. 167-68 (“*Mullane* supplies the appropriate analytic framework.”; rejecting petitioner’s call to use *Mathews* balancing), the Court observed that, in addition to the certified letter sent to the prison (which was signed for but not delivered by a prison guard), the government sent a certified letter to the residence where plaintiff was arrested, another to his mother’s house in Randolph, Ohio, and it published notice in the *Cleveland Plain Dealer*.

NOTE: JONES v. FLOWERS

Certified mail was good enough for service on prisoners in *Dusenbery*, but the Court rejected service by certified mail on a taxpayer in *Jones v. Flowers*, 547 U.S. 220 (2006). Gary Jones bought a house on North Bryan Street in Little Rock, Arkansas, in 1967. He lived there with his wife until they separated in 1993 and Jones moved into an apartment. He continued to pay the mortgage on the house to a mortgage company that deducted and paid the property taxes each month. Once the house was paid off, however, Jones neglected to pay the property taxes and the property was certified as delinquent. In 2000, the State Lands Commissioner mailed a notice of delinquency to Jones at the North Bryan address via certified mail. No one was home, and no one came to the post office in the next 15 days to retrieve the letter, so it was returned to the Commissioner “unclaimed.”

In 2002, a few weeks before the property was to be sold at public auction, the Commissioner published a notice of public sale in the *Arkansas Democrat Gazette*. Jones did not come forward. Although no bids were received at the auction, Linda Flowers made an offer a few months later, and the Commissioner again sent a certified letter to Jones at the North Bryan address stating that the land would be sold to Flowers if he did not pay his back taxes. The letter was returned unclaimed and the property, estimated to be worth \$80,000, was sold to Flowers for \$21,042.15. Flowers then brought proceedings to evict Jones’s daughter from the property.

Jones did not learn of the tax sale until his daughter brought him the notice of unlawful detainer Flowers had served on her. Jones responded by filing an action in state court claiming that the Commissioner’s attempts at notice were constitutionally deficient under *Mullane* and thus a taking of private property without due process of law. The state trial and appellate courts agreed with the Commissioner that two certified letters are all state law requires and, citing *Dusenbery*, all the process Jones was due under the Constitution.

Writing for the majority, Chief Justice Roberts observed that while due process “does not require that a property owner receive actual notice before the government may take his property,” *id.* at 226, when the government learns that its chosen method of notice has failed, *Mullane* requires that the government take additional steps. Following *Greene*, the Court observed that the Commissioner could have resent the letter by regular mail or posted notice at the house. *Id.* at 229. As the Court admonished:

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers,

handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman. . . .

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson v. Hanrahan*, we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. 409 U.S. at 40. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id.* at 146-147.

The Commissioner points out that in these cases, the State was aware of such information *before* it calculated how best to provide notice. But it is difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent. Under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case," *Mullane*, *supra*, at 314-315, that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case. . . .

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*. But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

Id. at 229-231. The Court rejected the Commissioner's argument that notice was reasonably calculated to reach Jones because he was under a legal obligation to

keep his address up to date with the tax assessor. It noted, however, that the Commissioner was under no obligation to check to see if Jones's address had changed after he took reasonable additional steps such as resending and posting notice.

Three Justices dissented, arguing that notice by certified mail to an owner's record address should be all that due process requires and insisting that the sufficiency of a state's method of notice must be assessed *ex ante*, at the time notice in any case is sent, not *ex post*, when considerations that go to whether a particular defendant actually received notice inevitably creep in.

Why would resending or posting have improved notice to Jones if he no longer lived at the property? Perhaps, despite its disclaimer, the majority is in effect requiring actual notice. The Court also may have inadvertently resuscitated posting as an alternative or supplemental way of giving notice. Maybe when the notice pertains to an inhabited dwelling, posting is actually better than certified mail, though the Court's larger point is surely that those giving notice must attend to context in choosing a method of service and implementing it.

3. Notice: Constitutional Requirements Ritualized: Rule 4

Rule 4 outlines the procedures required for serving notice in federal civil proceedings. While the plaintiff's lawyer may want to do more than required, she must not do less. Has the associate in the problem case succeeded in giving notice? In meeting the requirements of the Rule?

Originally, service typically involved in-hand delivery of a summons by a federal marshal. Revisions to Rule 4 in 1983 and 1993 shifted the primary method to mail delivery, with an option that defendants can waive further service—a far cry from the dramatic in-person deliveries of the past. As one commentator rather wistfully noted: “The awesome impact of the sheriff arriving in armor and on horseback . . . and the authority of the sovereign sealed in the hot, red wax of earlier times has been replaced by a bland manila envelope carrying a postage stamp that may celebrate notions of love or poetry.” Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183, 1188-1189 (1987).

The method of serving process has evolved to reflect both the Supreme Court's preference for mail, as well as the rise of businesses operating on a national scale. Today, standard service involves mailing a complaint and waiver to the defendant, who signs and returns the form. See Fed. R. Civ. P. 4(d). These provisions are designed to make the process of initiating a lawsuit simpler and cheaper for plaintiffs, but what incentives do the Rules create for defendants to acquiesce?

Using a means of service not expressly provided for in the Federal Rules is called “substitute service,” and courts have increasingly authorized substitute service through various digital platforms, recognizing the role of the Internet in contemporary society and business. In the first federal appellate case to address whether service effectuated via digital methods was a permissible form of substitute service, the U.S. Court of Appeals for the Ninth Circuit held that a foreign defendant could be served via e-mail. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002). The court noted that Rule 4(f) (3) permits courts

to direct service “by other means not prohibited by international agreement,” and concluded that e-mail service fell within this rule and satisfied due process. The defendant in question had a Web site and had structured its business such that it could only be contacted via e-mail. See also *In re Int’l Telemedia Assocs., Inc.*, 245 B.R. 713 (Bankr. N.D. Ga. 2000) (holding that e-mail service was authorized under Rule 4(f)(3) where it was the only means of communication between plaintiff and defendant). *Rio Properties* has been extended to allow substitute service via Facebook messaging. See *Juicero, Inc. v. Itaste Co.*, 2017 WL 3996196 (N.D. Cal. 2017) (upholding substitute service in patent litigation under Rule 4(f)(3) via message to defendant’s Facebook account, e-mail, and FedEx to attorney for defendant where defendant updates its Facebook page and responds to customer comments on the Web site on a weekly basis).

It makes sense that cases involving international defendants have prompted courts to experiment with digital substitute service. These parties can be more difficult to locate and serve using traditional methods. But the trend toward digital methods of service is not restricted to global litigation. A New York statute allows substitute service via e-mail, permitting the court to direct the manner of service upon individuals and corporations alike when the other methods outlined in state rules prove “impracticable.” *Snyder v. Alternate Energy, Inc.*, 857 N.Y.S.2d 442 (Civ. Ct. 2008). In *Snyder*, plaintiffs attempted in vain to locate the defendants’ physical whereabouts and contact them via telephone. But they were in frequent contact with defendants over e-mail and instant messaging software. Noting the “pervasive role the internet plays in today’s world,” *id.* at 443, and citing *Rio* and *Telemedia*, *id.* at 447-448, the court crafted an order requiring that plaintiffs e-mail service on two consecutive dates with “prominent subject line[s] indicating that what was being sent were legal papers in an attachment that was to be opened immediately.” *Id.* at 449. “To better insure the effectiveness of the notice to defendants,” the court also required plaintiffs to send paper copies of the e-mailed documents to the defendants’ last known physical addresses, and contact them at their last known phone numbers. *Id.* The court concluded its opinion by stating that the “broad constitutional principle” underlying judicially devised alternative service “unshackles the . . . courts from anachronistic methods of service and permits them entry into the technological renaissance.” *Id.* at 449 (quoting *Rio Properties*, 284 F.3d at 1017).

In federal court, one of the most common forms of substitute service occurs through Rule 4(e)(1), which permits the plaintiff to effectuate service in the method *permitted by state law* in the state where the district court is located. State law often provides specific methods and then includes a catch-all stating that after reasonable efforts to serve the defendant in person, service may be made “in any other manner, including electronically by social media, email, or other technology, that . . . will be reasonably effective to give the defendant notice of the suit.” 2020 Tex. Ct. Order 0040 (amending Tex. R. Civ. P. 106(b)(2)). The COVID-19 pandemic prompted courts to authorize substitute service where, in view of social distancing rules and shelter-in-place orders, defendants could not be served in person. See *Spencer v. City of Cibolo, Texas*, 2020 WL 2043980, at *1 (W.D. Tex. Apr. 27, 2020) (authorizing substitute service via mail and e-mail on defendant city council members who could not be served either at city hall, because it was closed, or at their homes because there was no answer at the door, process server was told

to leave the property and a “Trespassers Will Be Shot” sign was posted). But see *Hawkins v. Bank of America, N.A.*, 2018 WL 1616941 (S.D. Cal. Apr. 2018) (denying permission to serve by e-mail service because of uncertainty about whether e-mail address was current and valid).

In addition to e-mail and Facebook, courts have permitted substitute service via Instagram, Facebook, and Amazon Message Center where traditional methods were unsuccessful. Relevant factors include whether the wrongdoing alleged in the complaint occurred on or through the Internet and whether the structure of the online transaction at issue makes ascertaining the defendant’s location difficult. See *K.A. v. J.L.*, 450 N.J. Super. 247, 253 (2016) (in case where adoptive parents sought to enjoin defendant from holding himself out as child’s biological father, from contacting child through social media, and from posting information pertaining to child from social media sites, service via Facebook allowed because “recent activity on Facebook indicates that the account is active and that receipt of the documents is probable” and “Facebook includes a feature that allows the sender of the message to see whether the recipient has opened the same, thus indicating that the recipient is on notice of the message’s contents”); *Skullcandy, Inc. v. Sterling*, 2019 U.S. Dist. LEXIS 118489 (D. Utah July 16, 2019) (permitting substitute service in trademark infringement action via Amazon messaging service after repeated attempts to serve defendant at multiple addresses where defendant “operates a business through Amazon and uses Amazon’s electronic mail service to respond to customer questions and inquiries”; noting that “Amazon requires storefront owners to use their system and does not disclose a storefront owner’s name, address, email, or telephone number to the public”).

In addition to service of process on the *defendant*, many state courts and federal district courts have set up systems for online filing of papers *with the court*. The Advisory Committee on Rules of Civil Procedure has amended Rule 5(d)(3) to authorize all federal district courts by local rule to require papers to be filed, signed, or verified electronically, as long as the rules provide “reasonable exceptions.” And under Rule 5(b)(3), the same papers can be served on parties using the court’s electronic case management system. So once initial service of the summons and complaint occurs under Rule 4, most other papers in the case (motions, pleadings, notices, etc., see Rule 5(a)) can be filed and served electronically. Electronic case management systems are now pervasive in the federal courts and many courts use the same system to distribute orders to the parties.

Despite all of these innovations, personal service has continued to play a major role, and will likely do so even under the waiver of service provisions of Rule 4(d), which still contemplate hand delivery as the major fallback if service by mail should fail.

In most places these days, personal service is seldom done by the sheriff or marshal. Rather, professionals hired by the litigant seek out both easy- to-find and reclusive defendants. One commentator says that this “curious band of white collar soldiers of fortune” often supplies the “grease that gets the ponderous wheels of justice turning.” Here is his description of the business of one such office:

Batzi’s (the 26-year-old owner) business ebbs and flows with the season. This time of year he hears a lot from one client, Western Appliance. People whose budgets were blown on Christmas are falling behind on the

freezer payments. He works on a lot of child support cases in August and September. "A lot of ex-wives are taking their husbands back to court to get more money for the kid's clothes for school." July and August are the petty crime months when kids are out of school with too much time on their hands. "People are getting divorced all the time—except December. . . . They try to stick it through till the first of the year for tax reasons." In the fall Batzi serves a lot of roofers—the rainy season has begun, exposing shoddy work done the season before.

To serve papers, a process server can do anything short of impersonating an officer of the law. He can lie about his identity or intent. Batzi always carries a change of clothes in the back of his car for disguise. He delights in making "gag" phone calls to people he is tracking down, verifying their presence by informing them that they have just won a lifetime subscription to *Field and Stream*. . . .

Edward O. Welles, *They Also Serve*, San Jose Mercury West, Dec. 28, 1986, at 4. A lawyer's magazine details the consumer's point of view:

"Early in my practice," says Marc Alan Fong, a partner with Fong & Fong of Oakland, "I had some bad experiences with gutter service. I was looking for the cheapest way to serve, and cheapest isn't always the best."

Indeed, "gutter service"—the unauthorized drop-off or posting of papers—is the bane of the process-serving industry. Incompetent process servers can easily ruin a case by slipping papers through a mail slot, leaving them with an unauthorized substitute or even falsifying proof of service and tossing the actual documents. For an attorney, this unethical practice leads to loss of time, costly re-servicing and default judgments. The process server may also face a suit by the person mis-served.

Problems range from the mundane to the melodramatic. First, there's the task of locating the person to be served. Since process servers are generally regarded as door-to-door salesmen specializing in bad news, it's not surprising that all but the most pedestrian jobs require some degree of ingenuity. Seasoned veterans talk romantically about all-night stakeouts, scaling third-story ledges and devising elaborate ruses to trick a recalcitrant subject into identifying himself.

And there is always the prospect of violence. Some irate recipients of process, particularly in bitter domestic cases, take too literally the classical notion of killing the messenger.

"I've been threatened, chased, and had guns pointed under my nose," says Judith A. Cochran, owner of A and T Legal Process Service in Oakland. "One guy led a German shepherd right up against my jugular." Another time, Cochran served the owners of a circus while elephants trained in a yard next to the house. When Cochran handed over the papers, the housemaid energetically beckoned to the elephants in an indecipherable foreign tongue. "The elephants trumpeted and came running towards me," says Cochran. "I don't know to this day whether they were coming after me, or if they were just frightened by the maid."

Fred Setterberg, *Service with a Smile: Selecting the Right Process Server*, 5 Cal. Law. 55 (July 1985).

Whatever choices the lawyer makes about the method of service, delay is dangerous. For one thing, statutes of limitation in some jurisdictions run until service of process is complete. Filing the complaint in court is not enough to stop the statute of limitations from running. Second, Rule 4(m) gives plaintiffs 90 days to effect service before the court "must dismiss the action without prejudice . . . or order that service be made within a specified time." And as the following case shows, the technicalities of Rule 4 must be observed precisely in effecting service.

Mid-Continent Wood Products v. Harris

936 F.2d 297 (7th Cir. 1991)

COFFEY, CIRCUIT JUDGE.

Lawrence A. Harris appeals the district court's order denying his Rule 60(b) (4) motion to vacate and dismiss a default judgment on the grounds of improper service of process. We reverse.

I. FACTS AND DISPOSITION BELOW

Harris Plywood, Inc. ("Harris Plywood") purchased lumber from the plaintiff, Mid-Continent Wood Products, Inc. ("Mid-Continent") on three separate occasions between May and August of 1980. When Harris Plywood failed to make any payments on the three shipments, the parties entered into negotiations in October 1980 and Harris agreed that the amount due would bear interest at the rate of fourteen percent per annum and that payments would commence within a few weeks. After Harris Plywood failed to make any payments, Mid-Continent filed suit in April 1981 for breach of contract. The parties entered into negotiations for a second time and after these discussions proved fruitless, Mid-Continent filed a motion for a default judgment. On October 28, 1981, the district court granted Mid-Continent's motion for a default judgment in *Mid-Continent Wood Products, Inc. v. Harris Plywood, Inc.*, in the amount of \$28,544.75. Instead of executing on the default judgment, Mid-Continent accepted a promissory note for the judgment amount from the defendant Lawrence Harris, President of Harris Plywood, in December of 1981. When Harris failed to pay the amount due, Mid-Continent filed this action to collect on Harris' promissory note.

Mid-Continent makes clear that (to state it mildly) it had a rather difficult time locating Harris and serving him with the complaint and summons. Initially, Mid-Continent attempted to serve Harris personally through a U.S. Marshal in December 1982. One month later on January 5, 1983, the marshal again attempted service by certified mail at Harris' place of employment, Superb Realty Corporation. Harris denied receipt of this mailing.

Mid-Continent states it next attempted service in May 1983 through a private process server at what was thought to be Harris' residence at 13 Secor Drive, Port Washington, New York. On two separate occasions the server attempted personal service but found no one at the address. On the third attempt, the server left the

complaint and summons attached to the door of the residence, and followed this up by mailing another copy addressed to Harris at the same address.

At the request of the district court, Mid-Continent's attorney sent a letter on June 3, 1983, to the residence at 13 Secor Drive in order to notify Harris of an upcoming status hearing. A copy of this letter was also sent to Harris' counsel of record in the previous lawsuit, Samuel Panzer. Neither the letter to Harris nor the copy sent to Harris' attorney included copies of the complaint and summons. Harris' attorney contacted Mid-Continent on June 9, 1983, and proposed a settlement in which Harris would pay the entire amount due on the note in monthly installments. Mid-Continent's attorney rejected the offer and stated that if the full amount was not received, Mid-Continent would seek a judgment order against Harris. Nevertheless, Harris' attorney confirmed in writing Harris' intention of forwarding a check and promissory notes in partial satisfaction of the amount due under Harris' guaranty. As promised by Harris' attorney, a mailing arrived from Superb Realty, Harris' place of business, containing a check for \$1,000.00 signed on behalf of Superb Realty and three notes for \$1,000.00 each, also signed by agents acting on behalf of Superb Realty. On June 16, 1983, Mid-Continent's attorney again informed Harris' attorney that no settlement for less than the full amount would suffice and that if full payment was not received before the next status hearing on June 28, 1983, Mid-Continent would seek a default judgment against Harris. When no further payments were made, Mid-Continent obtained a default judgment against Harris on July 20, 1983, in the amount of \$24,549.92.

After securing the judgment, Mid-Continent alleges that it attempted but was unable to locate Harris' assets for some time for purposes of executing on the judgment. Six years later, in June of 1989, Mid-Continent located certain assets of Harris' in Massachusetts and attempted to execute upon the 1983 judgment. However, on August 31, 1989, Harris filed a motion for relief in the district court pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure³ claiming that because service on him did not properly comply with Rule 4 of the Federal Rules of Civil Procedure, the district court lacked personal jurisdiction over him at the time of the entry of judgment in 1983 and further that he never received a copy of the complaint and summons in this action. In support of his motion, Harris offered exhibits and affidavits stating that he never resided at 13 Secor Drive, Port Washington, New York, but stated that he lived at 15 Secor Drive, Port Washington, New York in 1983. He further stated that no one at 13 Secor Drive ever brought any documents pertaining to the case to his house at 15 Secor Drive. The district court issued an opinion denying Harris' motion to vacate and dismiss the default judgment on the grounds of improper service of process on November 1, 1989. While the district court acknowledged in its opinion that service upon Harris did not strictly comply with Rule 4, it nonetheless determined that strict compliance was unnecessary because of: 1) Harris' "actual knowledge of the lawsuit" based on Harris' former attorney's negotiations with Mid-Continent; 2) Mid-Continent's diligent efforts "to obtain technically proper service upon Harris"; and 3) Harris' evasive conduct in responding to the attempts at service of process.

3. Rule 60(b)(4) provides relief from a final judgment when the judgment is void.

II. ISSUE FOR REVIEW

The issue before us is whether a district court may formulate its own test to determine whether to assert personal jurisdiction over a defendant in the absence of service of complaint and summons in accordance with Rule 4 of the Federal Rules of Civil Procedure.

III. DISCUSSION

... The district court found that Mid-Continent's attempted service of process on Harris did not comply with Rule 4. The district court then proceeded to devise a three-part test and fashioned an exception to the usual requirements of strict compliance with Rule 4:

When the cases are examined, three requirements present themselves as requisite to finding an exception to strict compliance. First, it is imperative to upholding faulty service that the defendant actually know of a lawsuit. . . . Second, the server must show that he duly tried to serve the defendant properly; in other words, show that more than a minimum effort was made and that the service actually made on the defendant came reasonably close to satisfying the requirements. This is often stated in terms of the plaintiff having "substantially complied" with Rule 4's mandate. . . . Third, the equities of the situation must warrant an exception from the usual strict compliance requirement. Specifically, the focus here is on the conduct of the defendant in responding to the situation.

The district court determined that these three factors "point clearly toward an exception from strict compliance in this case."

Rule 4(d)(1)* provides that the complaint and summons shall, with respect to an individual defendant who is not an infant or incompetent, be made:

by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

The Supreme Court recently addressed the issue of judicially created rules authorizing the service of process:

We would consider it unwise for a court to make its own rule authorizing service of summons. It seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized. . . . The strength of this long-standing assumption, and the network of statutory enactments and judicial decisions tied to it, argue strongly against devising common law service of

* [The provision of the Rule referred to in the case as Rule 4(d)(1) now appears as Rule 4(e)(2).—Eds.]

process provisions at this late date for at least two reasons. First, since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized. Second, as statutes and rules have always provided the measures for service, courts are inappropriate forums for deciding whether to extend them. *Omni Capital International v. Rudolf Wolff & Company, Ltd.*, 484 U.S. 97 (1987).

This court has previously stated that a liberal construction of the rules of service of process "cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had." *United States v. Mollenhauer Laboratories, Inc.*, 267 F.2d 260, 262 (7th Cir. 1959).

... [T]he factors considered by the district court have questionable validity, and as a result, the district court's three-part test must fail. The first factor the district court considered in determining the jurisdictional question concerning Harris was its finding that Harris had "actual knowledge of the lawsuit" based on Harris' former attorney's negotiations with Mid-Continent. The district court quotes *Armco, Inc. v. Penrod-Stauffer Building Systems, Inc.* for the proposition that "[w]hen there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process." 733 F.2d 1087, 1089 (4th Cir. 1984). However, the appellate court in *Armco* found the service of process to be invalid despite the defendant's knowledge of the suit and thus, the trial court was without jurisdiction and the default judgment was void. *Id.* at 1089.

This court has long recognized that valid service of process is necessary in order to assert personal jurisdiction over a defendant. *Rabiolo v. Weinstein*, 357 F.2d 167 (7th Cir. 1966). Moreover, it is well recognized that a "defendant's actual notice of the litigation . . . is insufficient to satisfy Rule 4's requirements."

In a case similar to ours, the District Court for the Northern District of Indiana held that a defendant's knowledge of a lawsuit will not serve to "cure the deficiencies in service." *Bennett v. Circus U.S.A.*, 108 F.R.D. 142, 148 (1985). In *Bennett*, the plaintiff was unable to locate the defendant and attempted service of the complaint and summons by sending them certified mail to the law firm which had represented the defendant in a previous matter.

... [T]he *Bennett* court initially held that service of the summons and complaint upon the defendant's attorney was insufficient because the attorney had not been specifically appointed as an agent to accept service of process. Next, the court rejected the plaintiff's argument that the court had personal jurisdiction over the defendant because the defendant knew of the lawsuit prior to the entry of the default judgment. . . .

We agree with the *Bennett* court and hold that actual knowledge of the existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process. Even though Harris may have had knowledge of the lawsuit as a result of Harris' former attorney's negotiations with Mid-Continent, "actual notice alone is insufficient to give the court the jurisdiction necessary to allow it to enter a judgment against a defendant." *Id.* Thus, the district court's reliance on actual notice in determining that it had personal jurisdiction over Harris is erroneous.

The second part of the district court's three-part test focused on whether "the service actually made on the defendant came reasonably close to satisfying the requirements [of Rule 4]." The district court characterized this factor as whether the plaintiff "substantially complied" with Rule 4's mandate. The district court determined that Mid-Continent "tried diligently to obtain technically proper service upon Harris." The court further noted that these attempts "were sufficient to result in settlement discussions between the parties."

This court is reluctant to find jurisdiction based upon whether Mid-Continent "tried diligently" to serve Harris. Indeed, the extent to which the plaintiff "tried" to serve process should not be a factor as to whether a federal court has personal jurisdiction over a defendant. Rather, the requirements of Rule 4 are satisfied only when the plaintiff is successful in serving the complaint and summons on the defendant.

The district court cites *United Food & Commercial Workers Union v. Alpha Beta Company*, 736 F.2d 1371 (9th Cir. 1984), for its erroneous conclusion that a plaintiff need only come "reasonably close" to satisfying the requirements of Rule 4. However, *United Food* is applicable only to those cases in which the "substantial compliance" is used to prevent a technical error in the form of the documents under Rule 4 from defeating an otherwise proper and successful delivery of process. . . . Thus, to the extent that the "substantial compliance" doctrine has any validity, it is applicable to only those cases such as *United Food*, where it was involved to prevent a purely technical error in the form of the documents under Rule 4 from invalidating an otherwise proper and successful delivery of process.

Even if we agreed with the district court's interpretation of the "substantial compliance" doctrine (which we do not), the facts lead us to believe that ours is a case of "substantial non-compliance." The extent of Mid-Continent's efforts to obtain service on Harris consisted of the following: 1) one certified mailing of the complaint and summons to a business address of Harris (which Harris denies receiving), and neither the envelope containing the complaint and summons nor the return receipt evidencing delivery were ever returned; 2) three attempts at personal service by a private process server over a four-day period at an incorrect address; and 3) a noncertified mailing to the same incorrect address.

The district court also cites the settlement discussions between the parties' attorneys as proof that the above-cited attempts at service were sufficient. However, nowhere in Rule 4 is there an exception for settlement discussions in the absence of the usual requirements of proper service of process, nor does the district court cite any case law in support of this proposition. . . .

The third and final factor of the district court's three-part test is whether the "equities" of the case warrant an exception from the usual strict compliance requirement: "Specifically, the focus here is on the conduct of the defendant in responding to the situation." The court cites evasion of process by the defendant as "the most typical example" of this kind of conduct. . . .

The cases cited by the district court involve clear-cut examples of evasion: both involve defendants who specifically refused to acknowledge service and are thus distinguishable. The facts in the case before us fall short of establishing clear and convincing evidence of evasion on the part of the defendant. Unlike the defendants in *Nikwei* and *Benage*, there is no evidence that Harris either refused to accept his mail or actually received mail service but refused to acknowledge it. The district court

infers evasion on the part of Harris because of the repeated, *though faulty*, attempts at service of process by Mid-Continent. As we stated *supra*, valid service of process is a must in order to assert personal jurisdiction over a defendant. Furthermore, the district court found that Harris had acted inequitably by allowing his attorney to engage in settlement discussions with Mid-Continent's attorney and then challenging the service of process six years after the judgment was entered: "Defendant in this case simply sat on his potential defense until the plaintiff finally found some of his assets and only then attempted to assert it." While we certainly do not condone Harris' or his attorney's conduct, we are of the opinion that the record falls short of supporting a finding of evasion or inequitable conduct by Harris.

IV. CONCLUSION

The three-part test devised by the district court to uphold the default judgment entered against Harris fails to support an exception to the service of process requirements of Rule 4. Therefore, the district court's order denying Harris' Rule 60(b)(4) motion to vacate and dismiss the default judgment on the grounds of improper service of process is *reversed*.

NOTES AND QUESTIONS

1. Some might consider *Mid-Continent* the worst kind of insistence on legal technicality, while others might view it as the best example of the rule of law. What are the arguments for these two positions? What would happen if judges did *not* insist on the technicalities of Rule 4?

2. If, as in *Mid-Continent*, a default judgment has already been entered, the defendant will have to move to vacate the judgment under Rule 60(b)(4). The defendant will bear the burden of proving she is entitled to relief even though the plaintiff normally has the burden of establishing the court's power to hear the case and its power to bind the defendant to any judgment. In *Mid-Continent*, the court held that it did not matter that Harris had actual notice of the litigation against him: Rule 4 had to be followed to obtain personal jurisdiction over him.

But actual notice is not totally irrelevant when a default judgment is challenged. It can affect the burden of proof on a motion to vacate. The Second, Seventh, and Ninth Circuits have held that a defendant who had actual notice of the litigation carries a substantial burden of proving that service was improper, particularly when the plaintiff presents a return of service signed by the process server. *SEC v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007) (following *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 299 (2d Cir. 2005)); *O'Brien v. R.J. O'Brien & Assocs. Inc.*, 998 F.2d 1394, 1398 (7th Cir. 1993); *Bally Exp. Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400-401 (7th Cir. 1986). In *Internet Solutions*, the SEC presented a signed return of service by a process server with a "long and reputable" history and a sworn declaration from the process server claiming that the defendant verified his identity before accepting the summons and complaint for securities fraud. 509 F.3d at 1166. After moving to vacate the \$100,000 default judgment, the defendant conceded he knew about the lawsuit but claimed he was at a meeting in another

town the day the process server supposedly effected service. *Id.* Neither the district court nor the Ninth Circuit was convinced:

Each time Shaw's story was challenged he came up with new and often contradictory evidence to support his version of the facts. In the face of the process server's sworn affidavits, and given the district court's credibility findings in favor of the process server and against Shaw, we find that Shaw did not meet his burden to prove by strong and convincing evidence that he was not served with process.

Id. at 1167 (characterizing e-mail correspondence suggesting defendant might have been out of town as "rank hearsay").

3. Courts are particularly skeptical of challenges to service where there is evidence of deliberate evasiveness by the defendant. In *Travelers Cas. & Sur. Co. v. Brenneke*, 551 F.3d 1132 (9th Cir. 2009), the Ninth Circuit upheld service of process upon an evasive defendant where the process server saw the defendant in the window, "held the summons and complaint out towards the window, and announced in a loud voice 'You are served,'" and observed the defendant watch the server place the documents on the doorstep. *Id.* at 1134. The defendant was known to the server from effecting service in other lawsuits and the server had made four prior attempts at personal service in the instant case at the defendant's home. No one came to the door even when there were multiple cars in the driveway. On the night of the fifth attempt "an adult male answering to the name of [the defendant] responded" to the intercom "but never opened the door." That's when the "window" service occurred. The Ninth Circuit reasoned:

Sufficient service may be found where there is a good faith effort to comply with the requirements of Rule 4(e) (2) which has resulted in placement of the summons and complaint within the defendant's immediate proximity and further compliance with Rule 4(e) (2) is only prevented by the defendant's knowing and intentional actions to evade service.

Id. at 1136.

Note the differences among proper service of process in the sense of a) whether proper *methods* for service are deployed, versus b) whether the contents of the process are sufficient, versus c) (explored later) whether the court to which the defendant is haled has power over that defendant or the defendant's property. If anything is improper, the defendant in federal court may move to dismiss the action on the grounds of "improper service." Some state procedure codes require that the defendant distinguish among these types of process defects.

NOTE: SEEING JUSTICE DONE IN STATES OF EMERGENCY

The COVID-19 pandemic created a wide range of challenges for the administration of justice. During the early days of the pandemic, courthouse doors were closed as shelter in place orders took effect. Before vaccines became available and research on masking indoors developed, it was not possible to safely conduct live hearings, let alone convene juries and hold full trials. Lockdowns also impeded

in-person service of process. Some states were quick to respond to the access-to-justice crisis created by the pandemic. Texas state courts, for example, “moved online most aggressively,” holding over “1.1 million remote proceedings” in the first year of the pandemic alone. Eric Scagliano, *Zoom Court Is Changing How Justice Is Served*, *The Atlantic* (Apr. 13, 2021). While this so-called “virtual justice” movement was “an emergency response to a dire situation” it was also inspired by “a vision some judicial innovators had long tried to realize.” *Id.* The Chief Justice of the Michigan Supreme Court, Bridget Mary McCormack, insists that “going online can make courts not only safer but ‘more transparent, more accessible, and more convenient.’” *Id.* She is not alone. The Conference of Chief Justices and the Conference of State Court Administrators endorsed guidance stating that state courts should “move as many court processes as possible online.” *Id.* For these reformers, the pandemic provided the “disruption that courts needed” to innovate beyond “arcane trial procedures.”

In an effort to ensure that federal courts could respond more quickly to emergencies, the Federal Rules of Civil Procedure were amended in 2023 to add Rule 87, which gives the Judicial Conference of the United States authority to declare a “Civil Rules emergency” if it determines that extraordinary circumstances relating to public health or safety substantially impair the courts’ ability to perform their functions. Under a declared emergency, a court may authorize alternative methods of service of process, extend the time to file certain posttrial motions, and extend the time to appeal.

There are, however, reasons to be concerned about the shift to online civil justice, given that millions of Americans “live beyond the reach of broadband service and older people may be unable or unwilling to master videoconferencing technology.” *Id.* Even where access is possible, online trials raise privacy concerns; as one judge observed, live-streaming can risk “very private, embarrassing moments” being recorded and misused. *Id.* There is also a risk that “jurors, and witnesses, may get coached or coerced by offscreen eavesdroppers.” *Id.* The risk is especially high in domestic violence cases. But perhaps the greatest concern is the distance—both physical and psychological—that virtual courts create between litigants and judges. “I can’t pick a jury online,” one defense attorney said. “I’ve got to be in the room with those people.” And at trial, he said, the fog of video makes it easier for witnesses to lie. *Id.* Alex Bunin, the chief public defender in Harris County, Texas, notes that virtual justice interposes emotional as well as perceptual distance—to dire effect. “Once you distance people, the ability to have empathy diminishes greatly,” he told me. “If you watch a trial on-screen, you don’t respond as you would in person.” *Id.* Judges can be affected too. A study in Cook County found that judges set bail 51% higher for defendants seen via video compared to in-person hearings. *Id.* Despite concerns, virtual courts have boosted participation in the civil justice system, with higher responses to jury summons and near 100% defendant attendance in some states. *Id.* Some courts are adopting fully online systems that resolve cases algorithmically through chatbot interfaces with the parties—no lawyers, no judges.

But not all participation is equal. There is evidence that the convenience of online dispute resolution redounds mainly to the benefit of plaintiff-creditors in debt collection proceedings—the most common civil dispute in American